No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation
Appellant
vs.
TWOHY BROTHERS COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court for the District of Oregon

---

BRIEF OF APPELLANT

CHARLES A. HART,
Attorney for Appellant

L. B. DA PONTE,

CAREY, HART, SPENCER & MCCULLOCH,
of Counsel

SUBJECT INDEX

TABLE OF AUTHORITIES

TEXT BOOKS

STATUTES

No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation
Appellant
vs.
TWOHY BROTHERS COMPANY, a corporation
Appellee

Upon Appeal from the United States District Court for the District of Oregon

---

BRIEF OF APPELLANT

JURISDICTION

This is a suit of a civil nature, at common law, between citizens of different states. Appellee's complaint alleged (R. p. 6), and appellant's answer admitted (R. p. 27), that appellee is a corporation organized and existing under the laws of the State of Oregon, and is a citizen and resident of that state, and that appellant is a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen and resident of that state. The complaint further al-

leged (R. p. 6), and the findings and judgment disclose (R. pp. 169-173), that the matter in controversy exceeds the sum or value of $3000, exclusive of interest and costs. The pleadings further show that the action is one to recover moneys alleged to be due upon a contract, and in addition, damages for alleged breach of contract (R. pp. 6-24).

The District Court had jurisdiction of the cause under the provisions of Section 24 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 41). The issues of fact were tried and determined by the Court, without the intervention of a jury, pursuant to a stipulation duly filed (R. p. 175) under the provisions of United States Code Annotated, Title 28, Section 773.

This Court has jurisdiction to review, by appeal, the judgment of the District Court under the provisions of Section 128 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 225). The case is not one in which a direct review may be had in the Supreme Court under the provisions of Section 238 of the Judicial Code (U. S. Code Ann. Title 28, Sec. 345).

The rulings of the District Court in the progress of the trial of the cause may be reviewed by this Court upon appeal as provided for in United States Code Annotated, Title 28, Section 875.

STATEMENT OF THE CASE

This action was instituted by appellee, Twohy Brothers Company, as plaintiff in the Court below, to recover from appellant, Northern Pacific Railway Company, the sum of $691,874.66. To avoid confusion, we shall refer to appellee and appellant, in our explanation of the litigation, and in the argument to follow, as plaintiff and defendant respectively.

The action is based upon a contract entered into on October 15, 1925, under the terms of which plaintiff undertook to construct a branch line of railroad for defendant in northern Idaho. The work was commenced at once and was concluded in the latter part of 1927. Plaintiff's complaint was filed in the District Court in February, 1929. A word of explanation of the long delay to which the case has been subjected may be appropriate.

Shortly after the pleadings were completed, there was a reference to, and a preliminary trial before, an Auditor, who thereafter filed his report. Objections to this report and a motion to modify and correct it were submitted to the District Court on March 8, 1932. Thereafter the Court announced its readiness to dispose of the motion and objections in order to make the Auditor's report available for use at the trial of the cause, but no action was taken until a

substitution of counsel for plaintiff occurred, when, on November 4, 1935, a motion was filed for leave to amend the complaint. This was granted upon terms which plaintiff declined to accept (R. p. 177). Thereafter, as the result of a stipulation entered into on April 29, 1936, the case was submitted to the District Court upon the testimony taken in the preliminary trial before the Auditor (R. pp. 178-179).

The complaint purports to state a single cause of action. But there are in fact six separate claims alleged, two of them for money said to be due upon the contract, and four for damages for alleged breach of the contract. Three of these four may be considered together as one claim since they involve exactly the same question of contract interpretation. In result, there are four distinct claims or causes of action. The issues involved in each, and the disposition made of them by the District Court, are as follows:

I. Change of Work Claim

The first of the claims asserted by the complaint is that defendant made changes, during the progress of the construction of the railroad, in the work contemplated by the contract. Defendant had reserved the right to make changes, the unit prices for clearing, grading, etc., to be increased or decreased to accomplish substantial justice, whenever, in the judgment of

the Railway Company's Chief Engineer, any such changes materially affected the cost of doing the work.

The complaint alleged (1) that many changes had been made which greatly increased the cost of doing the work, (2) that the Chief Engineer so determined but that he undertook to allow a lump sum of $80,000 only in lieu of an increase in prices, and (3) that a payment to plaintiff of $326,785 was necessary because of the changes, in order "to do substantial justice between the parties," as required by the contract (R. p. 17). While the statement of changes compares the work performed with what defendant is said *to have represented* would be the work to be done (as if relief from the contract and recovery upon quantum meruit were sought), the District Court read the pleading as asserting the contract right to additional compensation when and as allowed by the Chief Engineer; and we understand this interpretation of the complaint is not questioned by plaintiff.

The District Court upheld defendant's contentions, first, that the work performed was, on the whole, the work contracted for and that no changes had been made which materially affected the cost of doing the work, and second, that the Chief Engineer had not been called upon to determine, and had not

determined, that any such changes had been made or that any increase of prices or equivalent additional payment was due the contractor by reason of alleged changes in the work (R. pp. 160-163).

The District Court's findings to this effect are not challenged by appellant. Its assignments of error present no question with respect to the claim for additional compensation based upon alleged changes in the work contracted for. The foregoing brief explanation of the claim has been made in order that the Court may have a clear understanding of the entire case. A more detailed explanation of the issues will no doubt be made by appellee, whose assignments of error upon its cross-appeal challenge rulings made in disposing of these issues.

II. Commercial Haul Claim

The second claim or cause of action asserted by the complaint seeks recovery of $329,184.70 damages for alleged breach of contract. The complaint alleged that under the terms of the contract for the construction work, plaintiff was given the exclusive right to haul (upon the railroad track when and as laid) all freight accepted for transportation from the public, this right to continue during completion of the construction work or until the railroad was turned over by defendant's engineering department (in charge

of construction) to its operating department (in charge of operation), payment to be made therefor on the basis of $1 per car mile (R. pp. 17-19).

It was further alleged that defendant, having obligated itself to handle a large volume of log tonnage during this period (that is, between the time of tracklaying and the time of final completion of construction) for a Timber Company, took immediate possession of the first 29 miles of the newly built line, and itself conducted this log transportation service. Plaintiff's claim was that if it had been permitted to handle this log tonnage, at the contract price of $1 per car mile, it would have made a profit of $329,184.70. Damages in this amount were demanded (R. pp. 19-22).

Defendant's answer and cross-complaint denied the existence of any contract right in plaintiff to conduct transportation service upon the branch line of railroad to be constructed, and asserted that the contract provisions to which the complaint referred contemplated nothing more than the movement of occasional cars of commercial traffic, in plaintiff's work trains, during the progress of the construction work. Defendant further alleged that in taking possession of a part of its line before final completion thereof, it acted within its rights under the contract, both be-

cause this merely relieved the contractor of some of the fiinishing work which the contractor could have been compelled to do without additional compensation, but also because the contract specifically gave the defendant the right to stop any part of the work at any time, or to change the work contracted for in any way desired, subject only to such price adjustment as might be determined appropriate by the Chief Engineer, in order to do justice between the parties (R. pp. 35-36).

Defendant further contended that since the time of opening its line to common carrier use was within its control, the amount of log traffic it accepted, after its decision to begin the transportation service at once when the track was usable, could not be taken as a measure of what commercial traffic would have been accepted for transportation by plaintiff in its work trains if no such decision had been made, and if the handling of cars of commercial traffic had been left to plaintiff at $1 per car mile (R. p. 36).

The District Court rejected defendant's interpretation of the contract and held that plaintiff was entitled, under the provisions of the contract referred to in the complaint, to conduct all commercial transportation service upon the track as it became usable, up to, but not beyond, the date specified in the con-

tract for completion of the construction work. This date was September 1, 1927; plaintiff's work was not in fact concluded until October 25, 1927, and defendant's engineering department did not turn the line over to the operating department until January 1, 1928 (R. pp. 169-170).

This interpretation of the contract resulted in a decision that defendant's action in taking possession of and using the first 29 miles of the railroad between July 17, 1927, and September 1, 1927, was a breach of contract. Damages in the sum of $125,000, based upon plaintiff's estimate of the profits it would have made in transporting the log tonnage handled by defendant between the dates specified, at $1 per car mile, were awarded (R. pp. 169, 173).

The questions presented by this appeal (with respect to the Commercial Haul Claim) are (1) whether the District Court erred in construing the contract as giving plaintiff the right to conduct transportation operations on the newly constructed line of railroad and to be paid $1 a car mile for all cars hauled, and as depriving defendant of the right to take immediate possession of its railroad in order to begin at once the transportation operations for which the road was intended, and (2) whether the District Court erred in accepting, as the measure of damages for the al-

leged breach of contract, what plaintiff might have earned if it had been permitted to handle the log tonnage actually transported by defendant.

These questions were raised in the Court below by defendant's motion for rulings interpreting the contract in accordance with its contentions (Defendant's Motion for the Adoption of Conclusions of Law II, III, IV and V, and of Special Findings of Fact XV, XVI and XVII), and by defendant's exceptions to the Court's order denying such motion (R. pp. 179-184), and by defendant's exceptions to the ruling upon these two questions contained in Finding of Fact XV as entered, and in Conclusions of Law II and III as entered, determining that defendant's actions constituted a breach of the contract entitling plaintiff to damages based upon the loss of Clearwater Timber Company log traffic (R. pp. 185-191).

The two questions were preserved for review by this Court through a bill of exceptions, duly allowed (R. pp. 175-273), and by defendant's Assignments of Error I to XIV, inclusive (R. pp. 346-360).

III. Bridge Material Claim

The third claim or cause of action (as we classify them for the purpose of the argument) includes the third, fourth, and fifth claims alleged in the complaint. All three involve a dispute as to the meaning

of the contract, and particularly as to whether the contract price for hauling bridge materials to the bridge sites was applicable to rail transportation of these materials in cases where the track had been laid to the bridge site in advance of the bridge construction, so that transportation by railroad became possible.

Plaintiff transported by rail in this way a substantial amount (1) of piling, for which it claimed payment at the rate of $.02 per lineal foot mile under Price Item 37 of the contract; (2) of bridge timber, for which it claimed payment at $.85 per thousand f. b. m. mile, under Price Item 38 of the contract, and (3) of metal fastenings for which it claimed payment at the rate of $.65 per ton mile, under Price Item 39 of the contract (R. pp. 21-23). These price items described the work as "hauling" (R. pp. 59-60). Plaintiff's contention is that these price items applied to all methods of hauling, by truck, team, or train.

Defendant's position is that the bridges were to be built *ahead* of the track and that use of the track for transporting bridge materials was never intended; that "hauling" in the price items meant bringing in the bridge materials by team or truck, or by dragging on tote roads or along the newly-constructed grade, and that Price Item 72 of the contract (R. pp. 38-41)

fixing a rate of $1 per car mile for rail transportation of company material covered any rail movement of bridge materials to bridge sites.

Defendant further contended that this question of contract interpretation was submitted to the Chief Engineer during the progress of the work, under the arbitration clause of the contract, and was decided by him adversely to plaintiff, and that the decision was accepted by plaintiff and acquiesced in by it during the progress of the work, and is controlling upon the Court.

The District Court accepted plaintiff's interpretation of the contract and held that defendant's refusal to pay at the rates specified in Items 37, 38, and 39, respectively, was a breach of contract. The difference between what was thus found due, and what was paid (at the rate of $1 per car mile) was allowed as damages. As to the piling, this amounted to $4693.29, as to bridge timber, $26,843.47, and as to metal fastenings, $1249.69 (R. pp. 38-40).

The District Court further held that the question of contract interpretation, as to the prices applicable to the hauling service, was not one for submission to or decision by the Chief Engineer under the arbitration clause of the contract, and that the claimed reference of the matter to him was not a submission of the

question to him or a decision by him under the contract, and that there was no pleading or proof of "estoppel against or waiver by" plaintiff (R. p. 171).

The questions for decision here are (1) whether the District Court erred in construing the contract as entitling plaintiff to payment for hauling bridge materials by rail, at the prices specified in Price Items 37, 38, and 39 of the contract, and (2) whether the District Court erred in holding and deciding that this question of contract interpretation was not one which could be submitted to or decided by the Chief Engineer under the arbitration clause of the contract, and in holding and deciding that what was done did not amount to a submission of the question to the Chief Engineer.

These questions were raised in the Court below by defendant's motion for rulings interpreting the contract in accordance with its contentions (Defendant's Motion for the Adoption of Conclusions of Law VI, VII and VIII, and of Special Findings of Fact XVIII and XIX), and by defendant's exceptions to the Court's order denying such motion (R. pp. 251-254), and by defendant's exceptions to the rulings upon these questions contained in Findings of Fact XIX and XX as entered, and in Conclusion of Law II as entered, determining that defendant's refusal to pay the prices claimed by plaintiff was a breach of con-

tract, and that the question of contract interpretation was not one which could be submitted to or decided by the Chief Engineer, and that there had been no valid submission or decision of the question, or waiver on the part of plaintiff (R. pp. 255-258). These questions were preserved for review by this Court through a bill of exceptions, duly allowed (R. pp. 175-273), and by defendant's Assignments of Error XV to XXV, inclusive (R. pp. 360-367).

IV. Final Estimate Claim

The fourth claim or cause of action (the sixth alleged in the complaint) demanded $26,938.03 as the balance due on numerous items of work; and it was alleged that defendant's Chief Engineer had refused to make a final estimate as required by the contract, showing this balance to be due, and that defendant had refused to make payment (R. pp. 23-24).

Defendant's answer alleged that the final estimate had been promptly prepared, but had been held up at plaintiff's request because of plaintiff's claims for additional compensation. Defendant further alleged that because of numerous advances and other debits, an accounting was necessary to ascertain what balance, if any, was due plaintiff (R. pp. 41-42, 50-51).

At the hearing before the Auditor, the parties reached an agreement as to this. It was stipulated that

the final estimate balance, excluding anything allowed on the change of work claim, the commercial haul claim, or the bridge materials claim, was $8865.75. Defendant concedes plaintiff's right to recover this amount, with interest from the date of the stipulation, February 13, 1930.

The District Court included in its findings one determining that defendant had breached its contract by failing to make a final estimate within thirty days after the completion of the work (R. p. 172). Defendant challenges the correctness of this decision (Defendant's Assignment of Error XXVI, R. p. 367), but since the balance due upon the final estimate is not disputed, the question raised will not be discussed.

Summarizing, defendant's appeal seeks to reverse the judgment of the District Court with respect to the second claim or cause of action, for breach of the alleged right to handle commercial traffic, and with respect to the third claim or cause of action relating to the prices payable for hauling bridge materials. No question is presented as to the first claim or cause of action, which the District Court decided in favor of defendant, or as to the fourth claim or cause of action, as to which the parties are in agreement.

SPECIFICATION OF ERRORS

Appellant relies upon the following assigned errors:

1. Defendant's Assignments of Error Nos. I to XV, inclusive (R. pp. 346-360).

2. Defendant's Assignments of Error Nos. XV to XXV, inclusive (R. pp. 360-367).

ARGUMENT

Introduction

Defendant found it necessary, in order to reach the precise rulings of the District Court, rather than the final decision resulting therefrom, to assign a considerable number of errors. But the questions of law presented are few in number. The first group of assignments, Nos. I to XIV, inclusive, present two questions of contract interpretation: (1) Was plaintiff entitled to the exclusive right to haul commercial traffic upon the road it built for defendant, from the time of tracklaying to the contract date for completing the work? and (2) if so, can the damages for deprivation of that right be measured by the volume of traffic handled by defendant in its operation during this period?

The second group of assignments, Nos. XV to XXV, inclusive, likewise present questions of contract interpretation: (1) What was the contract price for plaintiff's services in hauling bridge material, and (2)

was this question one which the Chief Engineer of defendant could decide under the arbitration clause of the contract, and (3) if so, was the reference to him and his ruling thereon such a submission and decision as was contemplated by the contract?

We shall discuss the two subjects to which these two groups of assignments respectively relate, in the order stated.

I.

COMMERCIAL HAUL CLAIM

First Summarized Assignment of Error

The District Court erred in holding and determining that the contract between the parties gave plaintiff the right to haul all commercial traffic upon the newly constructed railroad, or any part of it, from the time of tracklaying to the time specified by the contract for final completion of the work, to the exclusion of any right on the part of defendant to take possession of and to use its railroad or any part of it, whenever it deemed such railroad, or part thereof, ready for use.

(The foregoing is a summary of defendant's Assignments of Error Nos. I, II, III, V, VI, VII, VIII, X, XI, XII, and XIV, R. pp. 346-355, 357-360. These Assignments are printed in full in the appendix to this brief.)

Point 1

The contract between the parties was one for the construction of a railroad; the provision obligating plaintiff to haul cars of commercial freight in its work trains, conferred no right beyond that of transporting such cars in its work trains, at the contract price of $1 per car mile, while the construction work continued.

The right asserted by plaintiff to take and retain possession of a part of the railroad to be built, against the wish of its owner, and to haul thereon train loads of logs in commercial traffic at a price vastly in excess of the amount collected from the shipper, is not one readily discernible from the contract itself. But plaintiff says that this right is to be inferred from the language used in one of the Price Items, when read with two or three of the requirements for tracklaying and surfacing which appear in the Specifications attached to the contract.

The Court will note at once that the contract is one for the construction and not the operation of a branch line of railroad. The form is that of the ordinary railroad construction contract with which the courts are not unfamiliar. Before examining in detail the provisions of the contract and its specifications, upon which plaintiff relies, we pause to review the circumstances which gave rise to the assertion of the claim.

Defendant's Orofino branch was built primarily for the purpose of log transportation. The Clearwater Timber Company, which had undertaken the construction of a large lumber manufacturing plant at Lewiston, was to be the principal shipper (R. pp. 284-285). The contract between plaintiff and defendant for the construction of the railroad (dated October 15, 1925) provided that the grading, bridging, tunnels and tracklaying were to be completed on or before June 1, 1927, and that all work under the contract was to be completed on or before September 1, 1927 (R. p. 52).

In August, 1926, defendant was advised by the Timber Company that its Lewiston mill would be ready to receive logs by June 1, 1927. The volume of log tonnage anticipated was such as to require the movement of about 60 cars a day in each direction, which meant the operation of at least two trains with heavy power. To meet this requirement so far as it might be possible to do so, defendant determined that it would take over and begin the use of a part of the new line (the first 29 miles, between Orofino and Jaype) whenever the work on that part had progressed far enough to make the track usable even though all of the work upon this piece of track called for by the contract had not been completed (R. pp.

211, 232). Plaintiff was notified of this plan by letter written August 3, 1926 (R. p. 210-211). There was no direct response to this letter. The record is somewhat vague as to whether plaintiff at this time challenged defendant's right to proceed in the manner proposed; in a conversation on this and another subject (the application of the "hauling" prices to rail transportation of bridge materials), plaintiff's secretary remarked that the contract provisions would control, whereupon he was cautioned against a "too literal" interpretation of the contract (R. pp. 195, 234). At any rate, if any question was raised, it was dropped for the time at least by a letter written soon after, indicating complete acquiescence in the ruling of defendant's Chief Engineer upon both subjects (R. pp. 196-198).

During the following winter and spring plaintiff encountered many difficulties and there were frequent appeals to defendant for help. Finally, to avoid the complete collapse of the work and the threatened bankruptcy of plaintiff, defendant undertook the financing of the job under the terms of a supplemental contract entered into in April, 1927 (R. pp. 234-239, 145-147). Except for a casual reference attributed to defendant's Chief Engineer which he denied having made (R. p. 236), the subject of log transportation after track-

laying and before completion of all contract work was not mentioned during this period (R. p. 239).

No commitment had been given the Timber Company as to the time when logs would be accepted for transportation on the new line (R. pp. 231, 242), but in April, 1927, defendant filed with the Public Utilities Commissioner of Idaho a tariff quoting rates on logs from points on the new line to Lewiston and another point (R. pp. 247-248). In June, 1927, plaintiff orally and by letter asserted the right to conduct the proposed log train operation at the "commercial haul" price of $1 per car mile (R. pp. 200-207). Thereafter, on July 8, 1927, defendant gave plaintiff written notice to stop all work under the contract on July 16, 1927, on that part of the line between Orofino and Jaype, but to continue and complete the contract work on the remainder of the line (R. p. 205). Plaintiff accepted this notice and complied with the direction given, but registered a protest that it considered this a breach of the contract (R. p. 206).

On July 17, 1927, defendant began the operation of its log trains upon the part of the new line thus taken over. Between the opening date and October 25, 1927 (when all work by the contractor ended), 5250 cars of logs and 62 cars of other commodities

were handled; at the end of the year (when defendant's operating department took charge) there had been hauled a total of 7530 cars of logs and 344 cars of other commodities. These cars were moved a total of 443,184.70 car miles (R. p. 193).

Plaintiff's claim is that but for the alleged breach of contract, it would have hauled this tonnage and would have collected $443,184.70 from defendant at the "commercial haul" price of $1 per car mile. Its estimate of operating costs for the period was $114,000, leaving an anticipated net profit of $329,184.70, which amount it specified in its complaint as the damage sustained.

Briefly stated, plaintiff's contention is that the transportation of commercial freight was an essential, and to it a most important, part of the construction job, of which it could not lawfully be deprived. It is said in effect that plaintiff was engaged both to build the railroad and to conduct commercial transportation operations upon it for a definite period, and that defendant had no more right to exclude plaintiff from this transportation service than it had to deprive plaintiff of the work of building the grade or constructing the bridges.

Granting for the moment that defendant had no right to make any such substantial changes in the

work contracted for (despite the broad power given by the last paragraph of the contract to change the quantity, location, or nature of the work, conditioned upon an appropriate price readjustment, later to be discussed), is plaintiff's premise sound? Can the contract possibly be interpreted as giving plaintiff the exclusive right to operate trains hauling commercial traffic during the specified construction period, regardless of defendant's willingness to accept the construction work done prior to the expiration of this period, as sufficient compliance with the contract requirements, so as to permit defendant to begin at once the railroad operation for which the road was built?

We think these questions must be answered in the negative, for the following reasons:

1. Commercial Haul Incidental to Construction Work

Plaintiff was engaged to build and not to operate a railroad. Its agreement was to furnish

> "all labor, service and material for, . . . and to construct, complete and finish, . . . the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting, *and all other work for which prices are hereinafter named* on the branch line of the Railway Company extending from Oro Fino to Headquarters in the State of Idaho." (Italics ours.)

The hauling of cars of commercial freight over the newly laid track was not included in the work specifically described. It was part of the "other work" required of plaintiff by the clause we have italicized. What this other work might be was indicated, first, by the statement of unit prices in the contract (which evidently covered everything the contractor might possibly be called upon to do in the course of the construction work, R. pp. 56-65), and second, by the specifications attached to the contract which stated with particularity the manner in which the work was to be done.

With few exceptions, the work described in the price items in the contract itself is clearly part of the clearing, grubbing, grading, etc., which the contractor specifically agreed to do in building the line. But there are a few cases where the obvious purpose was to cover incidental services, not directly or necessarily a part of the construction work. Item 3 fixed a price for cutting isolated and dangerous trees (R. p. 56). Item 73 provided for the hauling of cars of material "in addition to contractor's own material," from the existing line to material yard tracks (R. p. 64).

Another, and apparently the only other item of this kind is Price Item 72, upon which plaintiff relies. It reads as follows (R. p. 63):

> "Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile .....$1.00"

This is all there is in the contract itself to obligate, and correspondingly to entitle, the contractor to haul "commercial business" upon the newly laid track. But the extent of the obligation imposed, and of the right conferred, is made clear by the Specifications for Tracklaying, Surfacing and Ballasting attached to and forming a part of the contract. Item 1 of these Specifications describes in general terms the tracklaying work (R. p. 121). Under the heading "Train Service," Item 2 provides that the Railway Company shall furnish work train service for ballasting, and that (R. p. 122)

> "All other work train service for track work, rail laying, etc., shall be furnished at the expense of the Contractor."

It is in Item 6 of these Specifications that we find provision made for handling cars other than those in use in the tracklaying or ballasting operations. The language used is significant. Item 3 indicated what

work train service would be required of the contractor and what would be furnished by the Railway Company; Items 4 and 5 made provision for car supply. Item 6 obligated the contractor to include in its work trains all extra car movement, as follows (R. p. 123):

> "6. Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other Contractors. The specified contract price per car mile to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company."

Following these provisions for work train service, the requirements for the track work were stated in detail. Train operations by the contractor for a considerable time after tracklaying were contemplated, but the Specifications made it quite clear that the contractor was not required, nor was it entitled, to continue train operations for any fixed period. The contractor's obligation was to continue the track work until the roadbed and track were acceptable to the Railway Company; and it should be kept in mind that acceptance of the track without requiring everything called for by the Specifications would not reduce the con-

tractor's earning on this branch of the work, since all tracklaying and surfacing work were paid for at a fixed sum per mile (R. pp. 62-63).

The particular specifications to which we have reference are these:

Item 15, relating to the placing of angle bars, has the following provision (R. p. 126):

> "After the track work has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight."

Item 26, relating to elevation of rails on curves (in the surfacing work), provides as follows (R. p. 129):

> "The track shall all be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer."

Item 34, under the heading "Completion Maintenance Acceptance," reads as follows (R. p. 131):

> "34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so maintained by the Contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until it is fully completed."

Item 38, providing for the bedding and tamping of ties, has the following requirement (R. p. 132):

> "Particular attention must be paid to this matter and no track will be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to standard plan, and all slopes neatly dressed."

Item 39, relating to outer rail elevation on curves in ballasting work, has the same requirement for maintenance until acceptance by the Engineer as that stated in Item 26 relating to surfacing work, as follows (R. p. 132):

> "The track shall be well lined and have a smooth and even surface, and shall be kept in that condition until accepted by the Engineer."

Under these specifications, the contractor was required to get the new track in usable condition before the Railway Company was obligated to accept it. This required work train service, which the contractor was obligated to provide; and while the work continued and the contractor's work trains were in operation, the contractor was required to handle in those trains whatever commercial freight the Railway Company decided to have transported.

Nothing more than this was required of the contractor. The contract proper obligated it to handle

commercial business only as "other work" which might be involved in one or more branches of the construction job. The specifications defined the obligation with particularity; as defined, it was limited to the movement of cars of commercial freight as a part of the contractor's work train service while the contractor was engaged in completing the track work.

If the advantage had been the other way,—if the log cars were to move only short distances so that the car mile rate prescribed by the contract would have yielded no profit, is it conceivable that the contractor could have been compelled to organize train service and conduct extensive freight train operations, because of its obligation to handle commercial business in its work trains? The immediate answer to any such demand would have been that the contractor was engaged to build the line, and not to operate it, and that no obligation to conduct freight train operations for the owner could be implied from the requirement for handling commercial cars in work trains during track finishing work.

Because the log haul proved advantageous, plaintiff asserted the right to run trains in commercial freight service *after* its track work on the particular part of the line had ended and its work train service terminated. But the same answer is to be made; the

contract imposed no duty, nor did it grant any right, to haul commercial cars except in the course of the track finishing work, and while the contractor was operating work trains in that service.

2. Duration of Track Work Within Defendant's Control

It is an essential of plaintiff's theory that defendant could not lawfully curtail the track construction work and thus deprive plaintiff of an opportunity to handle commercial business at the contract price of $1 per car mile; plaintiff interprets the contract as giving it the right to handle all commercial business, whether in its work trains or in regular freight service, during the entire construction period.

But what is the construction period and when did it end? The contract obligated plaintiff to complete the tracklaying by June 1, 1927, and to complete all work under the contract by September 1, 1927 (R. p. 52). These were time limits, however, imposed upon the contractor; they did not obligate, nor did they entitle, the contractor to stay on the job to the dates specified, if the work could be finished at any earlier time.

We assume plaintiff does not dispute this; its argument seems to be that it was entitled to continue at work until it had done everything which it could have been compelled to do in bringing the track to a

high standard of completion, even though the Railway Company was willing to accept something less and to pay the full contract price for it.

This is a strange interpretation to put upon the contract. The Railway Company bound itself to pay $1400 per mile for tracklaying and $1200 per mile for surfacing. For these payments it could require considerable supplemental work after actual use of the track began, to the end that when the track was finally accepted it would be ready at once for heavy traffic (R. pp. 128-131). But if the Railway Company was willing to take less for its money than the full measure of service that could have been exacted from the contractor, what is there in the contract to forbid this?

Plaintiff argues that what the Railway Company could demand it was obligated to demand *because* acceptance of less would shorten the time of possession of the line by the contractor and curtail its opportunity to haul commercial freight at a profit. There is no claim that plaintiff was deprived of any construction work for which it would have been compensated. It is the loss of the commercial freight hauling of which plaintiff complains; and the contention, in result, is that the right to haul commercial freight during the course of the construction work forbade any

curtailment of this work,—that the Railway Company, though willing to pay the full contract price for the track construction, could not accept less than a perfect job in order to begin the operations for which the railroad was intended, because the contractor would thereby lose some of the commercial haul it expected to secure.

A statement of the contention is sufficient to demonstrate its fallacy. Plaintiff was entitled to haul commercial freight only while its track completion work was going on. Defendant could require, but was not obligated to require, the continuance of this track work until a perfect job resulted. Its decision to accept less than it might have demanded under the specifications was within its rights under the contract. The duration of the track construction work, and of the period in which plaintiff might haul commercial freight, was a matter entirely within defendant's control.

3. Additional Considerations

The record has some evidence, for the most part uncontradicted, which indicates that the parties did not intend to contract for commercial freight transportation by plaintiff except as an incident to track construction work and while work trains were in operation.

(a) The hauling of logs during construction was entirely within the control of the defendant. No commitment had been given the Clearwater Timber Company as to the time the logs would be accepted for transportation on the new line. The Timber Company had been told that the railroad would be ready to haul logs by the time the Timber Company had its log pond ready to receive them; and as it turned out, the Timber Company's log pond was not ready for a considerable time after log transportation began (R. pp. 231-232, 242).

Eleven contractors submitted bids for the building of the railroad. Their prices under Item 72, applicable to commercial haul, ranged from 50 cents a car mile to $5 a car mile. In comparing the bids (by applying the unit prices bid to estimated quantities) no quantities at all were set up for commercial haul. Defendant's Chief Engineer expected that only an occasional car might be moved and assumed that the effect of this would be negligible upon the performance of the contract (R. pp. 231, 242).

Defendant had contracted with the Clearwater Timber Company for log transportation at a rate which allowed $1.60 per thousand feet for the haul on the new line. This yielded $9.75 per car. At the rate of $1 per car mile payable to the contractor, assuming the contractor to be entitled to conduct the transportation, de-

fendant would have been required to pay the contractor $56.40 per car for the identical service for which the Timber Company had paid defendant $9.75 (R. p. 233).

Defendant of course did not intend to have the contractor conduct the log transportation for it, at a price almost six times that paid for the service by the shipper. If defendant unwittingly entered into a contract that put it into such a disadvantageous position, that of course is its misfortune. But if the contract could possibly be thus construed, its provisions are at least ambiguous and the evidence to which we have referred shows that the minds of the parties did not meet upon any such engagement as that now contended for by plaintiff.

(b) Plaintiff's assertion that it anticipated a profitable log haul operation when it entered into the contract (R. pp. 218, 224) is negatived by the record, which indicates clearly that the claim here made was an afterthought, originating late in the performance of the work.

Defendant's Chief Engineer first advised plaintiff of the plan to take over a part of the line before final completion of track work, by letter written August 5, 1926 (Exhibit A-2, R. pp. 210-211). The work had then been in progress almost ten months. This letter was received by the contractor at a time when its of-

ficers were giving much attention to the financial problem involved in keeping the work going. But the letter, which gave preliminary notice that the contractor would be deprived of work counted on to yield $300,000 profit (according to the contention here made) was not even mentioned in their discussion (R. pp. 218-223).

Soon after, plaintiff's secretary went to St. Paul to solicit an advance of $50,000 from defendant's Chief Engineer. A dispute had arisen as to the contract price applicable to rail transportation of bridge materials (the third claim or cause of action in this litigation). This question, as well as defendant's plan to begin log transportation in advance of final completion of track work, was brought to the attention of plaintiff's secretary. His statement was that whatever the contract said would control, whereupon he was cautioned against a "too literal" interpretation of the contract (R. pp. 194-195, 212, 233-234).

Within a few days of this conversation, plaintiff's secretary wrote defendant's Chief Engineer for the purpose of making his position clear upon the two questions discussed. This letter, which was dated August 17, 1926, read in part as follows (Exhibit 32, R. pp. 196-197):

> ". . . We are to build this line to your full satisfaction, and in all the activities and operations in-

volved in that program we wish to comport ourselves and expect to be treated as a Department of the Northern Pacific under your direction, serving and advancing in every way we can the best interest of the company. I do not mean to imply, of course, that our contract does not substantially define and specify our duties, nor that we would ever seek to foist on you any of our proper responsibilities under it. I only want you to know that I regard our contract not as a strait jacket preventing any free modifications for the benefit of the work, and certainly not as a kind of legal fish-pond to hook advantage out of, but simply as a mutual written understanding, as exact and detailed and specific as it can possibly be made in advance, which sets out the method and time and price governing a complicated job we agree to do for you.

Under its letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretative complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including these two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the general principle governing all of us and underlying the whole contract."

During the ensuing eight months, plaintiff was constantly in difficulty financially and repeatedly so-

licited advances from defendant. No claim of right to conduct log haul transportation was advanced during this period, although plaintiff's secretary and its superintendent say that at one time (in November, 1926) defendant's Chief Engineer spoke of the possibility of a sub-contractor making considerable money out of the log haul (R. pp. 199-200, 216). This was denied by defendant's Chief Engineer (R. p. 240).

Passing this dispute in the evidence, the significant fact is that in April, 1927, plaintiff's affairs reached a crisis, and in this crisis plaintiff came to defendant for rescue with never a suggestion or hint that plaintiff had been deprived or was about to be deprived of any profitable work under the contract. On April 8, 1927, plaintiff's secretary, accompanied by plaintiff's banker (Mr. D. W. Twohy, chairman of Old National Bank of Spokane, R. p. 237), called upon defendant's Chief Engineer and announced that plaintiff was at the end of its resources, and stated that unless he (defendant's Chief Engineer) could find a way out for plaintiff, it would have to give up the job (R. p. 239).

It is altogether impossible to believe that at this time, April, 1927), plaintiff's officers and representatives entertained any notion that within two or three months they would be undertaking highly profitable

log transportation or that they then thought plaintiff had any right to do so under the contract. Their attitude was one of deep regret over plaintiff's financial plight, with no claim or demand of any kind that plaintiff be permitted to haul the Clearwater Timber Company's logs as commercial freight under the contract. Instead, earnest pleas were made that some way be found to keep plaintiff on the job, in order that its long and honorable career as a contractor should not end in bankruptcy and disgrace (R. pp. 244-245).

These requests were acceded to; a supplemental contract was entered into on April 26, 1927, with the Old National Bank as an additional party, which, after reciting plaintiff's default and defendant's right to cancel therefor, provided for the continuance of the work under a plan of financing by defendant (R. pp. 145-147). Plaintiff thereupon resumed work, and it was not until some time in June, 1927, that the right to conduct the log hauling operations was asserted (R. pp. 200-207).

It is apparent from the history of these events that plaintiff did not always consider the construction contract as giving it the valuable right now asserted. Certainly there was no occasion for its abject surrender, at the time the supplemental contract was

entered into, if it claimed the right presently to begin profitable log hauling operations. We submit this history as additional proof that the parties understood and interpreted the construction contract as providing for commercial haul by plaintiff only as a part of its work train operations while actually engaged in track construction work.

To summarize, appellant maintains that the contract provision under consideration cannot be interpreted as imposing an obligation, or as granting a right, to haul commercial freight for any fixed period, but only while the contractor was engaged in completing the track and was operating work trains in that service. When that track work ended, the obligation, and the right, to haul commercial freight ended with it.

We assume that in other circumstances the right of the Railway Company to take over and begin the use of its railroad whenever it considered the track usable, even though the contractor had not done everything that might have been required, could not be questioned. It is questioned here upon the theory that the contractor was engaged to haul commercial freight upon the new line for a definite time without regard to the continuance or cessation of the track construction work. We assert that the contract cannot be so

read and that the Railway Company violated no right of the contractor in making use of a part of its line without waiting for all of the track completion work that might have been required of the contractor.

Point 2

Defendant acted within its rights under the contract in stopping all work by plaintiff on the first twenty-nine miles of the line before completion of all track work, in order to permit defendant to begin log transportation.

When plaintiff indicated to defendant (in June, 1927, R. pp. 200-207) that plaintiff proposed to object to defendant's plan to begin the use of the line in the early summer of 1927, defendant served written notice, under the "stop-work" clause of the contract, directing plaintiff to discontinue all work on July 16, 1927, upon that part of the line which defendant intended to use (R. p. 205). Plaintiff complied with this notice, but asserted that defendant's action was an anticipatory breach of the contract (R. pp. 206-207).

The stop-work clause of the contract reads as follows (R. p. 68):

> "The Company at any time before completion may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof. On receiving such direction the Contractor shall stop work or diminish

> the force as directed, and shall have no claim whatsoever for damages by reason thereof, but shall receive payment for the work done in full discharge and satisfaction of all demands against the Company. Any notice given by the Company under this paragraph shall be in writing signed by the Chief Engineer, and shall be delivered to the Contractor or some person on the work representing him at least five (5) days prior to the required stoppage or reduction."

This provision of the contract reserved to defendant the right to do exactly what was done. Further track completion work on the first 29 miles of the line was stopped entirely. Defendant had determined that it could get along without all of the surfacing, lining, adjusting, etc., contemplated by the specifications. A large sum of money had been invested and it was essential to begin operations as soon as possible. The Clearwater Timber Company had asked for service and defendant concluded that it could advantageously forego some of the contractor's track work in order to get the line into operation as quickly as possible.

Can there be any doubt of defendant's right to do this under the "stop-work" provision of the contract? Such clauses appear in railroad construction contracts because large capital expenditures are involved, the construction work often continues for several years,

and the owner must be free to meet changing conditions without facing liability to the contractor for discontinuance of any of the work originally planned. *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695, 696.

The right reserved was to stop the work, *or any part thereof*. Whatever the occasion or purpose, whether to postpone all work because of delays encountered by the prospective shipper, or to hasten the beginning of operations to meet an unexpected demand for service, the construction work could be retarded, or halted entirely, upon the whole line or upon any part of it.

The right thus reserved was unrestricted; it could be exercised even though the result would be to eliminate construction work of advantage to the contractor. *Warren-Scharf Co. v. Laclede Co.*, supra. Here there is no claim that any advantageous *construction* work was taken away, or that anything further would have been paid to the contractor for track work if it had done everything called for by the specifications. But even though this had not been true,—if the work which was stopped would have been profitable, defendant's action in curtailing the construction work was nevertheless within its rights under the contract.

But plaintiff says that defendant resorted to the "stop-work" clause in bad faith for the purpose of depriving plaintiff of the profitable log haul. It is said, in effect, that the transportation of logs for the Clearwater Timber Company was a part of the construction job contracted for, and that defendant did not "stop" this part of the work within the meaning of the contract, but took it away from plaintiff and did it itself.

We have already pointed out that plaintiff was engaged to construct the railroad and not to operate it. There is nothing whatsoever in the contract, either directly or inferentially, to obligate plaintiff to operate a single train over the newly laid track, other than the work trains necessary for construction purposes. As to commercial freight, plaintiff was required to include cars carrying such traffic in its work trains. This was the limit of its obligation, and of its right, as was made quite clear by the tracklaying and surfacing specifications.

Let us assume for the moment, however, that the contract is susceptible of the construction plaintiff would place upon it. Upon this assumption,—that the transportation of commercial freight was an independent part of the construction job, is the "stop-work" clause inapplicable? Defendant had the right at any

time before completion to stop the work "or any part thereof" (R. p. 68). This certainly would permit defendant to halt ballasting and surfacing work at any time, if immediate use of the road was desired. If the transportation of commercial freight was a like part of the construction job, is there any reason why it could not also be stopped, in order to permit defendant to begin the use of its property?

Plaintiff's only answer is that stopping work under this provision of the contract meant complete cessation of all work and that no one activity could be suspended, particularly where the owner proposed to do this part of the work itself. But the right reserved was not merely to halt all work, but to stop *any part* of the work. There was no limitation or restriction upon this reserved right. If it developed that some part of the construction job under way could be completed advantageously after the owner's use of the property began, the owner had the right, for this reason or for any other reason, to stop the contractor's operations in this particular, and to make any substitute arrangement desired for the completion of the work.

This is literally what the parties agreed to in their contract. That it was intended, even though the contractor might be deprived of profitable work, is made clear by the provision of the contract (in the final

paragraph) for price adjustments in order to accomplish substantial justice, in the event of changes or reductions in the amount of work to be done. This provision reads as follows (R. p. 72):

> "The Company reserves the right at any time to change in whole or in part, as it may seem expedient, the line and grade of the railroad or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for 'extras' or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the Chief Engineer shall deem the change to have materially affected the cost of doing the work, he shall determine the price to be paid, either above or below, as the case may be, the prices herein provided, so as to do substantial justice between the parties."

This provision of the contract afforded plaintiff full protection against hardship due to the loss of any profitable work. The evident purpose was to leave the Railway Company free to change the work or reduce the amount to be done by the contractor, in any way desired, the contractor to be compensated, if the changes resulted disadvantageously, by appropriate price adjustments covering the work left in the hands of the contractor.

With this safeguard available, plaintiff is in no position to challenge the good faith of defendant in its resort to the "stop-work" provision of the contract. What defendant did was to begin the transportation operations for which the line was built. If this deprived plaintiff of an opportunity to make a profit, which we deny, the contract provided for a suitable adjustment so that substantial justice to both parties would result.

Even without a provision of this kind, a reservation of the right to stop work in a railroad construction contract has been literally enforced by the courts. In *Warren-Scharf Asphalt Paving Co. v. Laclede Construction Co.*, 111 Fed. 695, the Circuit Court of Appeals for the Eighth Circuit had before it a railroad construction contract which reserved to defendant the right to suspend all work, either temporarily or permanently, at any time. This right was exercised when the work had been partly done, whereupon plaintiff sued for its anticipated profits. The court, in sustaining the right to suspend work notwithstanding the resulting loss to the contractor, said:

> "The parties to the agreement had in mind both a temporary and a permanent suspension of the work, and, in language which cannot be misunderstood, stipulated that the defendant company might suspend operations under the contract, either temporarily or permanently (that is, abro-

> gate the contract altogether), on 10 days' notice. . . . It was entirely competent for the parties to enter into such an agreement, and such stipulations are sometimes found in contracts for the construction of railroads, and for the doing of other work of a like character, where unforeseen events may occur to render a temporary or permanent suspension of the work both desirable and necessary. We perceive no reason whatever for indulging in the assumption that, when the parties agreed that the work might be suspended permanently at the election of the defendant company, they did not mean what they said, but used the word 'permanently' in some new and strange sense."

Cases likes *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 Pac. (2d) 651, upon which plaintiff chiefly relied in the Court below, are not at all in point. The *Molyneux* case involved a contract for driving a tunnel, the length of the tunnel to be determined in the judgment of the owner, dependent upon the quantity of water released. The owner stopped work before the tunnel was half through, deciding to do the rest of the job itself. This was held to be a breach of the contract upon the part of the owner, since the termination of the contractor's work was not the result of any determination by the owner of the length of the tunnel to be driven.

The contract in the *Molyneux* case had no provision authorizing the owner to stop any part of the work at any time or to change or reduce the amount of work to be done by the contractor. This is true of other cases cited by plaintiff to the Court below. So far as we have been able to find, no decision of any court has denied the validity of broad provisions such as those before the Court in the case at bar, particularly where appropriate means are provided for safeguarding the contractor against the loss of profitable work.

We submit that if plaintiff had the right under the contract to conduct the transportation of commercial freight from the time of track laying to the date specified in the contract for the completion of all work, defendant was within its rights under the contract in terminating that service by the contractor.

COMMERCIAL HAUL CLAIM

Second Summarized Assignment of Error

The District Court erred in holding and determining that plaintiff is entitled to recover damages for defendant's alleged breach of contract in refusing to permit plaintiff to haul commercial freight between July 17, 1927, and September 1, 1927, based upon the volume of log traffic handled by defendant in the operation of its railroad between these dates.

(The foregoing is a summary of defendant's Assignments of Error Nos. IV, IX, and XIII, R. pp. 348, 356, 359. These Assignments are printed in full in the appendix to this brief.)

Defendant was under no obligation to transport freight for the public during the construction of its line. The "commercial business" to be hauled by plaintiff was only such freight as defendant might accept for transportation during the construction period. The volume of log traffic handled by defendant, after it had terminated the construction work, cannot be used as a measure of what would have been accepted and transported if the construction work had not been terminated, and if it had been necessary to delegate the hauling to plaintiff at the price of one dollar per car mile.

We restate briefly the facts necessary to an understanding of this question:

Defendant had made no commitment to the Clearwater Timber Company as to the time when logs would be accepted for transportation (R. p. 231); the hauling of logs during construction was entirely within the control of defendant's Chief Engineer; he assumed that an occasional car might be moved, but had never contemplated hauling logs for the Clearwater Timber Company in any regular operation under the "commercial haul" clause of the construction contract (R. p. 242).

On August 3, 1926, defendant advised plaintiff of its plan to begin operations on a part of the new line in June, 1927, without waiting for completion of all construction work thereon (R. pp. 210-211); defendant had just been advised that Clearwater Timber Company expected to be ready to make shipments at that time.

In April, 1927, defendant filed a so-called "construction" tariff with the Public Utilities Commissioner of Idaho, effective April 12, 1927, quoting a rate on logs from points on the new line to Lewiston, Idaho. This tariff stated that the shipments would be moved by and at the convenience of defendant's construction department until the formal opening of the line (R. p. 248).

On June 23, 1927, plaintiff advised defendant of its objection to defendant's plan to conduct operations upon a part of the line (R. p. 200). On July 8, 1927, defendant gave plaintiff written notice to stop all work between Orofino (where the construction work started) and the northerly end of Jaype Siding, on July 16, 1927 (R. p. 205).

Defendant began the transportation of logs on this part of the line on July 17, 1927. Between this date and October 25, 1927, defendant transported cars of logs a total of 304,301.08 car miles (R. p. 229).

Plaintiff estimated that if it had conducted the transportation, its operating costs would have been $595.90 per day (R. p. 218). The trial court held that plaintiff was entitled to damages based upon what it would have earned in transporting the logs which were in fact hauled by defendant, between July 17, 1927, and September 1, 1927, the contract date for the termination of the construction of the line. No evidence had been introduced to show the volume of traffic handled in this particular period, but the Court estimated the damages, based upon the record as to logs moved for longer periods, at $125,000 (R. pp. 339-340).

Appellant submits that the trial court was in error not only in deciding that defendant had breached its contract with plaintiff, but in awarding damages for the loss of the "commercial haul" under the construction contract, based upon the volume of business handled by defendant after it took the line over and began operations. Such an award necessarily assumes that the log traffic actually transported by defendant would have been accepted for transportation by defendant, and would have been turned over to plaintiff for handling as "commercial business," if the alleged breach of contract had not occurred.

This assumption misinterprets the contract. The

commercial business to be hauled by plaintiff was only such cars of freight (belonging to others than plaintiff or defendant) as defendant might decide to have moved over the new line while the construction work was in progress. Plaintiff's undertaking was to build the railroad, and during the final stages of the track work, to haul in its work trains any commercial freight accepted by defendant for such transportation. Defendant assumed no obligation to plaintiff to provide a single car to be thus transported. The contract could not have been misunderstood in this respect, since the road would not assume the status of a common carrier until construction ended and it was formally opened for service to the public; and there was no commitment to the Clearwater Timber Company or to anyone else that freight would be handled during the construction period except at the convenience of defendant's Engineering Department in charge of the construction work.

To meet the needs of a shipper definitely made known to defendant long after the contract with plaintiff was entered into, defendant decided to take over a part of the line and begin service upon it, before plaintiff had completed all of the track work contemplated by the contract. What "commercial business" did plaintiff lose thereby? What cars of commercial freight

would have been hauled by plaintiff for defendant, at the price of $1 per car mile, if defendant had not taken over the line as it did?

Obviously defendant would not voluntarily have undertaken extensive transportation service for Clearwater Timber Company, with plaintiff still at work on the line, if this required turning the cars over to plaintiff to be hauled at the commercial haul price specified by the contract. The shipper could hardly be expected to pay more than was actually paid, which amounted to $9.75 per car, as contrasted with $56.40 per car to be paid to plaintiff at the commercial haul price of $1 per car mile.

But we are concerned here not with what defendant might or might not have done under different circumstances, but with what defendant was legally obligated to do if the alleged breach had not occurred. Plaintiff cannot be said to have been deprived of profitable work under the contract unless the contract made it certain that plaintiff would have gotten that work but for the action taken by defendant.

The contract cannot be so read. Defendant was entirely free to accept or refuse commercial freight during the construction period. If plaintiff had remained in possession of the line until the completion of all possible track work, and if during the entire period

defendant had decided against moving any freight for the public, no claim could be made that plaintiff had been deprived of anything to which it was legally entitled under the contract.

In result, plaintiff lost nothing more than could have been taken from it even though it had been permitted to remain in possession of the line until all possible track work had been completed. The opportunity of transporting commercial business was taken away, but it was only an opportunity the exercise of which was always limited by the discretion of defendant.

Thus the award of damages made by the trial court rests only upon speculation as to what defendant would have done if plaintiff had been permitted to complete the track construction work. It is possible that the shipper might have been persuaded to pay a higher rate and that defendant would have accepted substantial log traffic to be hauled for it by plaintiff at the contract price. It is also possible, and as the record indicates, far more probable, that defendant would have declined to accept anything more than the occasional car of commercial freight contemplated when the construction contract was entered into.

Damages for alleged breach of contract require a more substantial basis than this. The injured party

is entitled to redress for the loss of what the contract assured him, and not for what he expected might be secured under it.

We cite as an illustration of this distinction the case of *Dennis v. Slyfield,* 117 Fed. 474. The owners of a vessel declined to go on with a written arrangement under which they had agreed to carry any or all of certain lots of hardwood lumber, as might be desired by the owners of the lumber during a certain season of navigation, at specified prices. This arrangement was held lacking in mutuality and therefore unenforceable. The court said (page 477):

> "It is not contended by the learned proctors who represent the libelants, that this writing of and by itself obligates the libelants to ship even a single carload of lumber by the vessels named. The respondent thereby agreed to carry at a price named all the lumber which libelants might from time to time during the season deliver to him for carriage, but it does not obligate the opposite party to do more—even by implication—than to pay him the prices named for the carriage of all lumber delivered for carriage during the season. The contract is therefore void for want of mutuality. (Citing cases) . . .
>
> "It is doubtless true that libelants expected to ship their entire season's lumber by respondent's vessels and that they expected to have for shipment during the season about 15,000,000 of feet. The respondent doubtless shared in these expecta-

> tions and expected to carry for the libelant the amount of lumber named, but it is well said in Knox v. Lee, 12 Wall. 457, 20 L. Ed. 287, and quoted with approval in Maryland v. Railroad Company, 22 Wall. 105, 112, 22 L. Ed. 713, that
>
> > 'There is a well recognized distinction between the expectation of the parties to a contract, and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow.' "

We submit that if plaintiff had any continuing right to retain possession of defendant's railroad until all track work was completed, damages for the loss of that right must be limited to the value of the right as it would certainly have been enjoyed under the contract. What was done by defendant under entirely different circumstances, when it had terminated construction work and had engaged directly in the operation of its railroad, cannot serve as a measure. The trial court was in error in assuming that defendant would have been obligated to carry on the same activity, with plaintiff as its operating agency, if the alleged breach of contract had not occurred.

II.

BRIDGE MATERIAL CLAIM

First Summarized Assignment of Error

The District Court erred in holding and determining that the contract between the parties entitled plaintiff to the application of Price Items 37, 38 and 39, respectively, of the contract (R. pp. 59-60), instead of Price Item 72 (R. pp. 63-64), to the transportation of bridge materials by rail.

(The foregoing is a Summary of defendant's Assignments of Error Nos. XV, XVIII, XX, XXIII, and XXV, R. pp. 360-367. These Assignments are printed in full in the appendix to this brief.)

The provisions of the contract for the hauling of bridge materials related to the movement of these materials to bridge sites before the track was laid; and the prices specified for such hauling did not apply to transportation by railroad.

The question in dispute is whether or not plaintiff is entitled to the hauling prices specified in Items 37, 38, and 39, respectively, for the transportation of such of the bridge materials as were brought to the bridge sites by rail. Defendant paid at these rates for whatever was hauled by other means, but took the position that Price Item 72, fixing a car mile price for rail transportation service, applied whenever the track was laid to the bridge site in advance of the bridge con-

struction, and the material was handled by rail (R. pp. 262, 264, 267). The difference was quite substantial; under Price Item 72, plaintiff would get a total of $30 for hauling a car of bridge timbers 15 miles (and for returning the empty car), whereas Price Item 38 applied to the same quantity of bridge timbers for the same distance would entitle plaintiff to $191.25 (R. p. 265).

Plaintiff's claim to the higher prices rests upon the fact that Price Items 37, 38, and 39 described the work to be paid for as "Hauling" (R. pp. 59-60). Since the term was not limited in any way, plaintiff demanded that the prices stated in these three items be applied to all transportation of bridge materials, regardless of the means by which the transportation was accomplished.

But the question cannot turn alone upon the way in which the price items described the work. The specifications must be examined in order to ascertain just what "hauling" of bridge materials was intended; and both price items and specifications must be read with all other pertinent provisions of the contract.

Item 2 of the Specifications for Bridging indicates clearly that when the contract was executed, the parties had no thought of hauling bridge materials to the bridge sites by rail. This Item reads as follows (R. p. 108):

"2. Bridges must be erected ahead of the track in all cases but the maximum team haul of materials shall not exceed four miles, except on written orders of the Engineer."

For reasons which are in dispute and which are not of importance here, this program was not adhered to. There was much delay in the construction of many of the bridges and the track was down and rail transportation became available for much of the bridge material. But it is clear that as originally planned, the bridge construction was thought to require a considerable amount of extensive hauling, along the new grade or perhaps on makeshift roads, in order to assemble the bridge materials at the bridge sites.

Defendant contends that this, and not railroad transportation, was the service to be paid for at the "hauling prices" of the contract. Some movement by rail was of course intended, but this would not ordinarily include materials to be used in the construction of the line itself. For such rail transportation, a per car mile rate was quoted by Item 72 of the contract (R. pp. 63-64), which applied to "all commercial business, material and empty cars of the Company."

Plaintiff was not engaged primarily to do hauling work. Its undertaking was to build a railroad. In many instances, no additional compensation was allowed for hauling. This was true of bulkhead work

(Price Items 23 and 24, R. p. 58), timber and log work in culverts (Price Items 28 and 29, R. pp. 58-59), and timber work in pier cribs (Items 53 and 54, R. p. 61). In other cases, an allowance was made for hauling, the evident purpose being to provide additional compensation because the lack of inexpensive transportation facilities made the cost of assembling materials unduly burdensome.

This is the explanation of Price Items 35 to 41, inclusive (R. pp. 59-60). The hauling there referred to was required in the construction of culverts and in bridge construction and other work expected to be done before track could be laid and railroad transportation made available. The cost of the haul was too substantial to be covered by the unit prices fixed for the particular job in which the materials were to be used. Railroad transportation after track laying was on an entirely different footing. Where this was possible, the contractor was permitted to resort to it and for any such hauling, he was allowed $1 per car mile.

The scale of prices fixed for the two forms of transportation indicates that this was what was intended. Items 35 to 41, inclusive, specified prices per ton or thousand f. b. m. per mile, the particular price depending upon the varying cost of the transportation; it is obvious that there would be a wide difference in the cost of hauling by team or truck, as be-

tween bridge timbers and metal fastenings. On the other hand, Item 72, covering rail haul, fixed a price per car without regard to the commodity transported, since there would ordinarily be little difference in the cost of moving a car by rail, whether loaded with one commodity or another.

Plaintiff's contention that there was no distinction intended between rail haul and team haul (the latter term including truck or tractor haul, R. p. 265), and that the contractor was entitled to the hauling prices for both types of service, is negatived by the provisions of the bridge specifications to which we have already referred. Timber and piles furnished by the Railway Company were to be delivered at the Railway Company's material yard, and provision was made for payment to the contractor for hauling to the bridge sites, but there was the restriction that "the maximum team haul of materials shall not exceed four miles except on written orders of the Engineer." (R. p. 108).

This restriction indicates a clear intent to differentiate between team haul and rail haul. The specifications contemplated a program which required construction of all bridges ahead of the track. This meant that the bridge materials would be hauled by rail from the material yard to the end of track, and from that point on by any other means available. Because such "team haul" for substantial distances would be costly,

the contractor was not permitted to build the bridges more than four miles ahead of the track without special authority from the Engineer.

If plaintiff's contention is correct, and the prices for hauling were applicable alike to team haul and rail haul, the restriction of four miles for team haul would be meaningless. It can be given effect only upon the assumption that "team haul" as used in the specification referred to, and "hauling" as used in the Price Items, were identical and were not intended to include rail haul.

The trial court recognized this difficulty but held that in result the word "hauling" in the Price Items was ambiguous. Resort was had to testimony which the Court thought sufficient to show that the term was intended to cover both kinds of transportation (R. pp. 340-341).

This conclusion is not warranted by the record. The testimony referred to was given by plaintiff's Superintendent concerning a change made by defendant's Chief Engineer in the wording of two price items just after plaintiff had been awarded the job. According to this witness, Items 35 and 36 of the bid sheet furnished plaintiff provided for "team haul" of concrete pipe and corrugated iron pipe, whereas other price items referred merely to "hauling." In

the discussion of the work with Chief Engineer Stevens, plaintiff's Superintendent says that he called attention to the fact that only in Items 35 and 36 was "team haul" called for, whereupon Mr. Stevens agreed to change, and did change, these two items to eliminate the word "team" (R. p. 259).

Defendant's testimony (Witness Stevens, R. p. 265) disputed the statement that this change was made at the suggestion of plaintiff's Superintendent. It was explained by the witness Stevens that the term "team haul" is now virtually obsolete, since hauling is done largely by trucks and tractors, and that he made the change on his own initiative merely to harmonize Items 35 and 36 with the other price items (R. pp. 265, 268).

But if plaintiff's version is to be accepted here (although there was no special finding on the subject), the testimony establishes nothing more than the fact of the change at the instance of plaintiff's Superintendent. If his purpose was to have it understood that the haul might be "by rail, truck or otherwise," as he stated upon cross-examination (R. p. 261), that purpose was not made known to defendant's Chief Engineer. In result this testimony discloses nothing as to the intent of the parties in the use of the word "hauling" in the price items.

Plaintiff's witness upon this point sought to strengthen his position by the assertion that plaintiff had hauled "lots of corrugated pipe by truck, team, *and rail,*" and had been paid the hauling price for it all (R. pp. 259-260). But upon cross-examination he could recall only a very few isolated instances of rail haul, where tracklaying reached the culvert site before the contractor was able to get the pipe in. It was admitted that ordinarily all the culvert work would be done as the grade was built, long before the time of tracklaying (R. p. 261).

We submit that the provisions of the contract allowing additional compensation for assembling materials, including those specifically applicable to bridge materials, were intended to cover hauling service incidental to the construction of the railroad and not transportation upon the railroad after it was built. Plaintiff has been paid for its rail haul of bridge materials at the rates properly applicable to that service and is not entitled to recover anything additional.

BRIDGE MATERIAL HAUL

Second Summarized Assignment of Error

The District Court erred in holding and determining that the question of the rate applicable to the haul of bridge materials was not a matter for sub-

mission to the Chief Engineer of defendant under the arbitration clause of the contract and in holding and determining that defendant's action in refusing to pay the prices claimed by plaintiff was not based upon or pursuant to a decision by the Chief Engineer under said arbitration clause of the contract.

(The foregoing is a summary of defendant's Assignments of Error Nos. XVI, XVII, XIX, XXI, XXII, and XXIV, R. pp. 361-366. These Assignments are printed in full in the appendix to this brief.)

POINT 1

Arbitration clauses in construction contracts delegating to an engineer or architect of the owner the power to decide questions in dispute between the parties, including questions of interpretation of the contract, are valid and enforceable.

The contract between plaintiff and defendant had the following arbitration clause (R. pp. 55-56):

> "To prevent disputes and misunderstandings between the parties and to provide for the speedy settlement of such as may occur in relation to the provisions of this agreement, or the true intent and meaning hereof, or the manner of performance by either party, the Chief Engineer of the Company is made the umpire to decide all such differences; he shall also decide the amount and quantity, character and kind of work done and materials furnished by the Contractor,

> including all extra work and material; and his decision shall be final and conclusive on the parties."

While the work was in progress plaintiff demanded payment for all transportation of bridge materials at the prices stated in Price Items 37, 38, and 39 of the contract. The Assistant Engineer, upon whom the demand was made, at once referred the question to the Chief Engineer for a ruling, notifying plaintiff that this had been done (R. pp. 269-270). The Chief Engineer thereupon wrote the Assistant Engineer, sending a copy to plaintiff, as follows (R. pp. 270-271):

> "Your letter of August 9th with copy of letter from Mr. Boss requesting payment on basis of team haul for material used in the Whiskey Creek Bridge.
>
> Mr. James Twohy called on me last week and I advised him that we would be glad to pay team haul for such material as was actually hauled by team and that for material hauled by train we would pay train haul as covered by item 72 of contract. You will further note there is a 4 mile limitation on the team haul item.
>
> I think it was thoroughly understood, both by the contractors and ourselves, how these clauses of the contract were to be interpreted and see no reason for raising the question at this time."

Thereupon plaintiff's secretary, in charge of the

work, wrote defendant's Chief Engineer as follows (R. pp. 196-198):

> "I have been somewhat troubled about our brief and rather hurried discussion in your office on Friday, on the subject of a hauling price on bridge material, and also on the subject of operating the line between June 1st, and Sept. 1st, hence this personal word to make my position quite clear. . . .
>
> Under its (the contract's) letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretive complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including those two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the general principle governing all of us and underlying the whole contract."

The District Court held in its findings and conclusions and in denying defendant's motion for the adoption of requested findings and conclusions (R. pp. 171, 251-254) that the dispute over the rates applicable to the haul of bridge materials was not one which could be submitted to the Chief Engineer under the arbitration clause of the contract. This decision defendant believes to be contrary to the set-

tled rule in the courts of the United States. The right of contracting parties to bind themselves to submit anticipated disputes to an arbitrator or umpire, even though the person named is an officer or representative of one of the contracting parties, is too well settled by decisions of the Supreme Court and of Circuit and District Courts to be questioned here.

Ever since *Kihlberg v. U. S.*, 97 U. S. 398, provisions of this kind have been given the full breadth of operation contemplated by the language used. The distinction attempted to be made by some state courts which have upheld arbitration clauses as to questions of fact but not as to questions of law has not been accepted in the federal courts. The delegation of power to an architect or an engineer to settle questions of interpretation of a contract as well as disputes of fact as to classification of materials and the like has uniformly been approved and enforced.

There is a comprehensive review of the decisions of the Supreme Court and of other federal courts upon this question in *McCullough v. Clinch-Mitchell Construction Co.*, 71 Fed. (2d) 17, a decision of the Circuit Court of Appeals for the Eighth Circuit. The Court, referring to arbitration clauses such as that here involved, said:

"Such stipulations are evoked out of the experi-

ence of railroad companies in such construction work. From its very nature, extending over a long line of road, with diversified topography of country, encountering many varieties of geological formation, and difficulties impossible of anticipation, the variant views and notions of contractors and subcontractors respecting the infinite details of the work, the classification and measurement of material, the prevention of incessant wrangles over the work, with its annoyances and litigation, justified the railroad company in requiring, as a condition precedent to letting the construction of this work, the acceptance of the foregoing provisions of the contract." (Citing cases.) . . . "As said in United States v. Gleason, 175 U. S. 588, 602, '. . . It is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work, shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.' "

Other decisions of the Supreme Court stating this rule, in addition to *U. S. v. Gleason* referred to in the decision just quoted are *U. S. v. Mason & Hanger Co.*, 260 U. S. 323, *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185; *Ripley v. U. S.*, 223 U. S. 695, *Plumley v. U. S.*, 226 U. S. 545, and *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387.

Many decisions of circuit courts and district courts could be cited illustrating the application of the rule. See, for example, *Memphis Trust Co. et al. v. Brown-Ketchum Iron Works*, 166 Fed. 398, *Kennedy v. City of White Bear Lake*, 39 Fed. (2d) 608, *Penn Bridge Co. v. Kershaw County*, 226 Fed. 728, *Corporation of Charles Town v. Ligon*, 67 Fed. (2d) 238.

The trial court in the case at bar took the position that interpretation of the contract was a question of law which could not be submitted to the Chief Engineer as umpire under the arbitration clause of the contract (R. p. 338); this notwithstanding the conclusion that the inconsistency between the price items and the bridging specifications which we have heretofore discussed effected "an ambiguity upon the word 'hauling'" (R. p. 340).

This is squarely in conflict with the decision of the Supreme Court in *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387. In that case the question submitted to and decided by the supervising architect was one of contract interpretation, in every respect as much a question of law as that here involved. The Court in upholding the power of the architect to finally dispose of the question, said:

> "If we may concede to appellant an ambiguity in the specifications, arising from the use of the

> singular word 'building,' instead of the plural word 'buildings,' . . . at the utmost it could only be said that there was ground for dispute, and, under the contract, the decision of the architect upon the dispute was final."

See also *Smith v. Copiah County*, 239 Fed. 425, in which the meaning of the word "overhaul" was determined by the engineer under the terms of a clause leaving questions of contract interpretation to him.

We submit that the trial court plainly erred in refusing to give effect to the decision of defendant's Chief Engineer, upon the theory that the dispute as to the applicability of the hauling prices to rail transportation was not a question which could be submitted to or decided by the engineer.

POINT 2

Formal notice and a hearing were not essential to the validity of a ruling by defendant's Chief Engineer upon a question of contract interpretation. The dispute as to the meaning of the term "hauling" was in fact submitted to the Engineer, plaintiff was notified of the submission, and had an opportunity to be heard, after which the Engineer announced his decision, which was thereupon accepted by plaintiff.

Plaintiff's reply asserted that any decision of the Chief Engineer upon the dispute over prices applicable to rail transportation of bridge material is of no effect, first, because there were no formal arbi-

tration proceedings, and, second, because the Engineer did not exercise an impartial or an honest or independent judgment upon the question (R. pp. 155-157). The trial court held (although the ruling is incorporated in a finding and not in a conclusion of law) that there was no submission to the Chief Engineer under the contract, and that defendant's refusal to pay the prices demanded by plaintiff was not "pursuant to the arbitration clause of the contract, but constituted an arbitrary exercise of an assumed power" (R. p. 171).

Since the facts are not in dispute, it seems necessary to go to the trial court's opinion to ascertain what was meant by this finding, and particularly whether it was a determination of a fact issue, or instead, a conclusion as to the legal effect of what had been done. Upon the question of arbitration of the "hauling" dispute, the trial court said (R. p. 341):

> "The questions as to whether there was submission for arbitration, whether a law question could be so submitted, whether the Engineer acted under this submission, or whether any decision by the Engineer could stand considering this attitude in these particular claims, have been adequately discussed and are decided in favor of the plaintiff."

In the statement that these questions had already

been adequately discussed, the Court referred to what had theretofore been said in its decision that there had been no effective arbitration of the dispute over the right to handle log traffic as "commercial haul" under the contract (R. pp. 338-339). While this contention had been advanced in defendant's affirmative answer (R. p. 49), it was not pressed thereafter, and was not included in defendant's Requested Findings (R. pp. 179-184). The trial court assumed that it was still an issue in the case and passed upon it, and in doing so, held that the Chief Engineer, after fortifying himself with an opinion from defendant's counsel, had acted arbitrarily in forcing plaintiff to give up the log haul, and that this was constructive fraud (R. p. 339).

Defendant did not contend in the Court below, and does not now contend, that there was any evidence of a submission of the commercial haul question to the Chief Engineer under the arbitration clause of the contract. We make this explanation here because the trial court's opinion seemed to confuse the question of arbitration of the bridge material question with the supposed log haul arbitration issue, and particularly because the Court's strictures upon the attitude and actions of the Chief Engineer can have no possible reference to what was done in passing

upon the dispute over the rate applicable to the haul of bridge materials. This question was submitted by letter to the Chief Engineer after plaintiff had presented its claim in writing. The matter was discussed with plaintiff's Secretary, and a decision as to the meaning of the contract was thereupon made, in which decision plaintiff's Secretary thereafter acquiesced (R. pp. 269-271, 196-198).

We assume, therefore, that the question passed upon by the trial court, (in rejecting defendant's contention that this particular dispute had been arbitrated), is whether the steps taken amounted in legal effect to a submission of the matter under the arbitration clause of the contract. There were no formal arbitration proceedings. No formal hearing was held, and plaintiff was given no advance notice of the time when the Chief Engineer would take up and dispose of the question in dispute. The trial court apparently thought this necessary; it must be assumed from the two parts of the opinion to which we have referred that the Engineer's decision was held ineffective because of the lack of formal notice and hearing (R. pp. 338, 341).

This view overlooks the fact that the stipulation for determination of disputes by the Chief Engineer, while appearing in the contract under the heading

"Arbitration" (R. p. 55), makes no provision for arbitration proceedings, if by that term is meant a formal hearing or hearings after notice to the parties. The agreement of the parties was simply that the Chief Engineer of defendant should have the power of decision upon all disputes arising in the performance of the work, whether as to the meaning of a contract term or as to the quantity or quality of the work done, or as to any other disagreement between the parties with relation to the work.

Stipulations of this kind, whether called "arbitration" clauses or not, have been literally enforced in the Federal Courts ever since *Kihlberg v. U. S.*, 97 U. S. 398 and *U. S. v. Gleason*, 175 U. S. 588. Decisions of engineers and architects made on the job, with never a thought of formal arbitration proceedings, have been held final and conclusive because the parties had stipulated that this should be so. Many cases involve disagreements as to the classification of materials excavated. The engineer examines the material and makes his decision. He does not conduct a formal arbitration; he personally settles, in the speedy manner contemplated by the contract, the dispute which has arisen. Formal arbitration proceedings would be entirely impracticable; they would defeat the expressed purpose to provide for a speedy

settlement of disputes arising in the performance of the work.

Examination of the many cases in which clauses of this kind have been upheld will disclose that almost always the decision of the engineer or architect was made informally and without resort to anything like a formal arbitration. In *U. S. v. Gleason*, 175 U. S. 588, the engineer disallowed the contractor's demand for an extension of time. In *Chicago, Santa Fe & C. R. Co. v. Price*, 138 U. S. 185, the decision reviewed was the engineer's estimate of quantities excavated. In *Penn Bridge Co. v. Kershaw County*, 226 Fed. 729, the "decision" upheld was simply the engineer's certificate as to the quantity and quality of the work done.

Illustrations could be multiplied. In the great majority of cases there is no reference to formal arbitration; the decision of the engineer, or architect, however made, is enforced unless he has failed to exercise an honest judgment upon the question in dispute.

It is significant that in the many cases involving these so-called arbitration clauses in construction contracts, the question of notice and hearing has rarely been raised. It is said in 9 Corpus Juris, 770, that notice and hearing are necessary, but the three cases cited as authority have been overruled by later de-

cisions. Two of them are early New York decisions which are contrary to a later New York case, *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, and the other is an Illinois case which was specifically overruled by *Corf v. Lull*, 70 Ill. 420. The *Sweet-Morrison* case considered the question at length and came to the conclusion that a formal arbitration proceeding would be altogether inconsistent with the purpose of the stipulation, and could not be required. We quote from the opinion:

> ". . . The only reason appearing in the findings or suggested by the evidence for thus disturbing that which the parties had expressly stipulated should be final is that the chief engineer did not personally measure the work, and that when the final estimate was about to be signed he refused to allow the plaintiffs to call a witness to contradict the statements already made to him by the subordinate engineers. This involves an inquiry into the nature of the power intrusted to the chief engineer. Was he an arbitrator, as that term is understood at common law, or was it his duty in estimating quantities to simply make a summary computation, as held by the learned general term? The answer to this question must be found in the contract, which is both the source and limit of the power under consideration. . . .
>
> . . . Was it the duty of the chief engineer to hear evidence? We have already held that the

nature of his trust was such as to permit him to rely upon the reports of his subordinates in making his estimate. The same reasoning which led us to that conclusion applies with equal force as an answer to this question. Did the parties expect him to try a lawsuit? For, if the door is opened to admit one witness, why should not all who know anything about the matter be allowed to come in? And what would this involve? . . . Did the parties expect that a man charged with the responsibility of building a great railroad could stop long enough to enter upon an investigation, through witnesses called and sworn, with such possibilities? To ask this question is to answer it. We think that it was the intention of the parties to clothe the chief engineer with the power of summary computation, based upon his experience in building railroads, his general knowledge of this road, the original surveys, measurements, plans, specifications, and such other *data* as would be presumed to be in his possession, but chiefly upon the reports of the skilled engineers working under him. It thus became his duty to exercise his judgment upon all the facts thus ascertained, and to fairly make the estimate. There was no delegation of authority, further than was impliedly authorized by the contract. Wiberly v. Matthews, 91 N. Y. 648; Billing, Awards, 76, 77."

The same conclusion was reached in *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347, where the Court said:

". . . In the practical working of this plan of supervision and adjustment of differences the cumbersome formalities of a notice to or a hearing of the parties before making decision were evidently not contemplated, as such a requirement is not found in any provision of the contract. Neither was it required by the character of the undertaking. For the purposes of their decision they (the architects) were free to adopt such legal principles as they honestly believed applicable, and to act on such evidence as they chose to receive. . . ."

Other cases to the same effect are *Heidlinger v. Onward Construction Co.*, 90 N. Y. Supp. 115 (affirmed without opinion, 188 N. Y. 572, 80 N. E. 1114), and *State v. Equitable Surety Co.*, 140 Minn. 48, 167 N. W. 292.

As these decisions indicate, parties to construction contracts may, if they desire, stipulate that disputes in the performance of the work may be left for decision to an engineer or architect of the owner; whether correctly termed an "arbitration" or not, the exercise of this function by the party designated does not require notice and hearing or any of the formalities of an arbitration proceeding. Such a proceeding would be unworkable and impracticable in most in-

stances. Contract provisions such as that here involved, which contemplate nothing more than a good faith decision of the engineer or architect, are to be enforced as written.

What has been said assumes that the statement in the findings of the trial court that defendant's refusal "to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power" (R. p. 171), was intended as a conclusion that the Engineer, in undertaking to decide the dispute, had acted beyond his powers under the contract, and not as a finding that he had exercised the power wrongfully or had been guilty of constructive fraud. The reply pleads that there was constructive fraud, however, and if it is to be urged that the finding so held, we point to the fact that there is nothing in the record to support such a finding. The trial court should have granted defendant's motion for a conclusion of law to this effect (R. p. 254).

According to plaintiff's witness Twohy, Chief Engineer Stevens displayed impatience and irritation at his (Twohy's) suggestion that the contract would con-

trol upon both the commercial haul and bridge material questions (R. pp. 195-196). Mr. Stevens says he was merely emphatic (R. pp. 234, 264). Which of the two questions aroused the irritation, if any, does not appear. Assuming it to have been directed toward the bridge material contention advanced by plaintiff, it falls far short of establishing the constructive fraud charged; and there is nothing else in the record to suggest that the question of contract interpretation involved was not fairly and honestly decided.

We submit that the dispute over the interpretation to be given the contract provisions relating to the haul of bridge materials was submitted to and decided by the Chief Engineer in the manner contemplated by the contract. His decision was in fact accepted at the time by plaintiff (R. p. 197); but whether accepted or not, the contract provision making it final and conclusive should have been given effect by the trial court.

CONCLUSION

Appellant believes that the commercial haul theory advanced by plaintiff and accepted by the trial court, —that there was a contract right to operate freight trains for defendant after construction work had ended, and that defendant could not terminate or shorten the construction work in order to make use of its property,—is contrary to the plain intent of the contract. Plaintiff was obligated, and was entitled, to include in its work trains, while its construction work continued, all commercial freight accepted for transportation by defendant, but defendant retained the right to determine for itself when the road was ready for the transportation service for which it was built. The exercise of that right was not a breach of the construction contract.

Appellant further maintains that it paid plaintiff for its service in hauling bridge materials at the contract rate properly applicable thereto, and that if the contract was ambiguous in this respect, the decision of its Chief Engineer against the contention of plaintiff is final and conclusive.

Appellant submits that the judgment of the Dis-

trict Court should be reversed and that judgment should be entered in favor of plaintiff for the sum of $8865.75, with interest from February 13, 1930, less defendant's costs upon this appeal.

CHARLES A. HART,
Attorney for Appellant.

L. B. DAPONTE,
CAREY, HART, SPENCER & MCCULLOCH,
Of Counsel for Appellant.

APPENDIX

DEFENDANT'S ASSIGNMENTS OF ERROR

Now comes defendant herein and in connection with its petition for an order allowing an appeal in this cause, assigns the following errors which defendant avers occurred on the trial of the cause and upon which defendant relies to reverse the judgment entered herein as appears of record:

(Assignments I to XIV, inclusive, relate to ruling interpreting contract to give plaintiff the right to conduct operations on the railroad to be constructed.)

I.

The District Court erred in ruling that the contract between the parties, dated October 15, 1925, for the construction of the so-called Orofino Branch of defendant's railroad, gave plaintiff the right to retain possession of the newly constructed line and to conduct all commercial operations thereon, until the date fixed by the contract for completion of the work contracted for. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its [292] Requested Findings of Fact Nos. XV, XVI and XVII, respectively, and in the

making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, required and permitted plaintiff to conduct transportation operations on the railroad, as constructed, only in its work trains as called upon to do so by defendant, as an incident to the construction work, and did not prevent defendant from taking over and making use of any part of its railroad whenever it was deemed ready for such use.

II.

The District Court erred in ruling that the contract between the parties denied defendant the right to take over and use any part of the railroad to be constructed, in advance of the date specified in the contract for completion of construction, whenever defendant deemed such part to be sufficiently completed for use. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II. III, IV and V, respectively, and for the entry of its Requested Findings of Fact Nos. XV, XVI, and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and

is erroneous in that the contract, correctly interpreted, permitted defendant to use its property as soon as it deemed said property to be ready for use.

III.

The District Court erred in ruling that the contract between the parties did not permit defendant to take possession of and to use any part of the railroad to be constructed, by reason of the provisions of the contract authorizing defendant [293] to stop work or any part thereof or to change the amount of work to be done under the contract. Said ruling was made in the Court's order denying defendant's motion to make and adopt its Requested Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, gave defendant the right to stop any part of the work required of plaintiff; or to change the amount of work to be done by plaintiff under the contract.

IV.

The District Court erred in ruling that plaintiff is entitled to recover damages from defendant for loss of opportunity to conduct transportation operations on said railroad, measured by the volume

of business actually done by defendant. Said ruling was made in the Court's order denying defendant's motion to adopt its Requested Conclusion of Law No. IV and in the making and adopting of Finding of Fact No. XVIII and Conclusion of Law No. II, and is erroneous in that defendant was not legally obligated to accept any commercial traffic, and the volume actually handled by defendant cannot be taken as the measure of what would have been accepted for transportation, if plaintiff had been permitted to remain in possession of the part of the railroad taken over by defendant.

V.

The District Court erred in holding and determining that defendant, in taking over and operating in commercial log haul transportation, between July 17, 1927, and September 1, 1927, the first 29 miles of the railroad constructed under the terms of the contract between the parties, breached its obligations under said contract. Said holding and determina- [294] tion was made in the making and adoption of Finding of Fact Nos. XV and XVIII, respectively, and Conclusion of Law No. II, and in the order denying defendant's motion to make and adopt its Requested Finding of Fact No. XVI

and Conclusions of Law Nos. II, III, IV and V, respectively, and is erroneous in that the contract between the parties, correctly interpreted, gave defendant the right to take possession of and use said portion of said railroad, at the time such possession was taken.

VI.

The District Court erred in making and adopting the following "Finding of Fact" in that said Finding misinterpreted the contract between the parties, as specified in the foregoing assignments of error Nos. I, II and V, respectively:

"XV

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of $10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log

tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

'NORTHERN PACIFIC RAILWAY COMPANY

Engineering Department
St. Paul, Minn. July 8, 1927.
[295]

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.
Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. Stevens'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

'NORTHERN PACIFIC RAILWAY COMPANY

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.
Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and [296]) other ma-

terial required for the completion of your contract.

Yours truly,

H. M. Tremaine,
Assistant Engineer.'

This was answered by Twohy Brothers as follows:

'Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,

By '

The defendant did take possession of that portion of the road mentioned in the defend-

ant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do [297] it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927."

VII.

The District Court erred in adopting the following Conclusions of Law in that said Conclusions misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in

the foregoing Assignments of Error Nos. I, II, III, IV and V, respectively:

"II

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of with interest thereon at six per cent per annum from February 13, 1930	$ 8,865.75
On the commercial haul, the sum of without interest prior to judgment.	125,000.00

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	$26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69

without interest prior to judgment." [298]

"III

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred."

VIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XV

Under the terms of the construction contract, plaintiff was required to complete ballasting and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part

of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

IX.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVI

Defendant made no commitment of any kind to [299] anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

X.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVII

Plaintiff, during the negotiations leading up to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of $1.00 per car mile therefor."

XI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion:

"II

Plaintiff was not entitled, under its contract with defendant, to retain possession of any

[300] part of defendant's branch line of railroad, after tracklaying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof."

XII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after track-laying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time."

XIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following

Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor."

[301]

XIV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"V

Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover upon its claim for damages for alleged breach of contract in this particular."

(Assignments XV to XXV, inclusive, relate to decision interpreting contract as to prices payable for transportation of timbers, piling, and bridge metals.)

XV.

The District Court erred in ruling that the contract between the parties entitled plaintiff to payment at the rates specified in Price Item 37 (2 cents per lineal foot per mile), Price Item 38 (85 cents per M per mile), and Price Item 39 (65 cents per ton per mile), of the contract for the haul of piling, timber and metal fastenings, respectively, which were in fact transported by rail. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VI, and in the making and adoption of Finding of Fact No. XIX and Conclusions of Law Nos. II and III, respectively, and is erroneous in that the contract, correctly interpreted,

makes said prices applicable to piling, timbers, and metal fasten- [302] ings hauled otherwise than by rail.

XVI.

The District Court erred in ruling that the question in dispute between the parties, as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, respectively, was not a matter for submission to the chief engineer under the arbitration clause of the contract. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX, and is erroneous in that the contract, properly interpreted, made such a dispute a matter to be submitted to and decided by said chief engineer.

XVII.

The District Court erred in holding and determining that the question in dispute between the parties as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, was not submitted to the chief engineer or decided by him under the arbitration clause of the contract. Said holding and determination was made in the

Court's order denying defendant's motion for the adoption of its Requested Finding of Fact No. XVIII and Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX and Conclusion of Law No. II, and is erroneous in that the submission of said dispute to said chief engineer and the decision thereof by him were established by uncontradicted written evidence.

XVIII.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinter- [303] preted the contract between the parties, as specified in the foregoing Assignment of Error No. XV:

"XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile	$ .02
Hauling timber furnished by the company per thousand feet b.m. mile	.85
Hauling metal fastenings per ton mile	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for

hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid $47,253.99. The defendant has paid but $20,410.52 of this amount, leaving unpaid and due to plaintiff on this item $26,-843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid $5353.78. The defendant has paid but $660.49 of said amount, leaving unpaid and due to the plaintiff on this item $4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid $2563.31. The defendant has paid but $1313.62 of this amount, leaving unpaid and due the plaintiff on this item $1249.69."

XIX.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XVI and XVII, respectively:

"XX

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX

was not submitted to the chief engineer for decision, was [304] not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

XX.

The District Court erred in adopting the following Conclusion of Law in that said Conclusion misinterpreted the contract and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XV, XVI, and XVII, respectively:

"II

Defendant breached its contract by * * * refusing to pay the plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, * * * Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers	$26,843.47
For hauling piling	4,693.29
For hauling bridge metals	1,249.69

without interest prior to judgment."

XXI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony: [305]

"XVIII

During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber and piles and metal fastenings described in the complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of $1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of $1.00 per car mile."

XXII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony:

"XIX

After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

XXIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion: [308]

"VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term 'team haul' as used in the contract

meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track."

XXIV.

The District Court erred in denying defendant's motion made before final submission of the cause, for an order adopting the following Requested Conclusion of Law in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute."

XXV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order adopting the following Requested Conclusion of Law, in that said Conclusion was required by the contract, properly interpreted, the

facts admitted by the pleadings, and the uncontradicted testimony:

"VIII

Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials." [307]

XXVI.

The District Court erred in making and adopting the following Finding of Fact, holding and determining that defendant breached its contract in failing to render a final estimate at the conclusion of the work, in that said holding and determination is contrary to the uncontradicted testimony:

"XXII

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required."